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Lawyers as Political Entrepreneurs?

A Historical Perspective on the Contribution of Lawyers to Legal Integration in Europe

Peter van den Berg

1. Introduction

At least since the birth of the republic of Rome, law and 'lawyers' have been of great importance in European societies. The purpose of this paper is to shed some light on their role, especially in relation to the process of state formation. It will, however, not cover the last two millennia completely. It will start with a paragraph on the growing importance of law and lawyers since the 11th century, followed by a section containing a short overview of the various contributions of lawyers to the process of state formation until 1800. Subsequently, this essay will focus on a specific contribution of lawyers to the early modern European state: their part in the unification of private law. Two processes of legal unification will be described, based on the English and the French historical developments respectively. In the last paragraph some concluding remarks on the significance of the past contribution of lawyers to legal integration for the development of the European Union will be made. These remarks should be regarded as being of a tentative nature.

2. The Growing Importance of Law and Lawyers since the 11th Century

In the thirteenth century the English cleric and judge Henry Bracton (1210-1268) found it appropriate to state in his famous book on the laws of England that 'in rege qui recte regit necessario sunt duo haec, arma videlicet et leges'.¹ "In a well governed kingdom", Bracton wrote, "two things are indispensable: arms and laws." It is significant that equal value was attributed to 'laws' as to arms. We have to realize that for a large part of the early Middle Ages aggressive force was the dominant factor in life and that therefore weapons were of primordial importance to any ruler who wanted to enforce his will. In France, and elsewhere in Europe, feud was a very common way of coping with conflicts and violent self-help was ubiquitous.² From the ninth century onwards Carolingian and Merovingian kings tried to establish peace in their country,

1 H. Bracton, *De legibus et consuetudinibus Angliae*, Cambridge Mass.: Harvard University Press (1968); (G.E. Woodbine (ed.)), 'introduction'.

2 A. Harding, *Medieval law and the foundations of the state*, Oxford: Oxford University Press (2002), pp. 58-59.

using the [164] concept of law and justice, but their means of enforcing it turned out to be too shallow.³ The failure of the Carolingian kings did not mean that the whole concept of justice was lost, though. Like an Emmenthal cheese, there were pockets of justice, provided by monasteries, towns and other local entities, such as seigniorial courts. In England the problems were less grave and better dealt with. But on the whole there was a lot of violence in Europe: it was intrinsic to feudal aggrandizement.⁴

Only from the eleventh century onwards were kings able to successfully build their states. Kings managed to a certain extent to suppress violence in a process that could be called the spread of organized peace.⁵ This happened in close collaboration with the Church, where the idea of the peace of God had become very popular. Again, law was an important means. Conflicts tended to be increasingly solved with recourse to law. It is no coincidence that from 1159 to 1303 every pope was a lawyer.⁶ In the beginning, this way of dealing with conflicts probably resembled more a process of negotiation than our procedure according to rules. Harding recently argued that justice was not only an essential feature of the state as we know it. In a way it preceded it, since the development of a functioning legal system created the state. Significantly, the word 'state' originally referred to a well-ordered state of affairs in a kingdom. In England, too, kings were rather successful in this respect, although violence was always just around the corner. In the twelfth and thirteenth centuries, therefore, law could be said to be of equal importance to weapons. The earlier quotation from Bracton illustrates precisely that. With the ascendancy of law as a fundamental corollary of the state, lawyers became an important force in society. It is the purpose of this essay to describe in more detail the way they fulfilled this role.

We have, however, to address a preliminary question first: whom should we regard as 'lawyers'? This analysis will include anyone who had undergone a substantial training in law, either at a university of some sort or in a more practical environment, such as a court. We probably could also designate them as 'jurists'. Of course some scholars have limited their study to the role of university-trained lawyers, and for good reasons. Especially on the continent, at least in France and Germany, many legal practitioners had a university degree in law.⁷ Furthermore, the influence of canon law and Roman law since the 11th century is nowadays considered to be of exceptional importance to the development of continental law. Since universities were an important vehicle of this influence, the so-called reception, a focus on the 'Gelehrte Juristen', the [165]

3 *Ibid.*, 43.

4 *Ibid.*, 67.

5 H.J. Berman, *Law and revolution. The formation of the western legal tradition*, Cambridge Mass.: Harvard University Press (1983), p. 90.

6 R.W. Southern, *Western society and the Church in the Middle Ages*, Harmondsworth: Penguin Books (1982), pp. 131-132.

7 In France and Germany a legal degree became a prerequisite for members of the judiciary rather early on. G. Buchda, 'Gelehrte Richter', in: *Handwörterbuch zur deutschen Rechtsgeschichte (I)*, Berlin: Schmidt (1971), 1477-1481.

'learned jurists', is only logical. Literature on these 'Gelehrte Juristen' is abundant. Lieberich conducted extensive investigations into the university background of the members of the council of the Duke of Bavaria.⁸ It is not necessary to limit the kind of research to secular legal advisers, since particularly in the later Middle Ages many of the recruited jurists belonged to the clergy, and were trained in canon law.⁹ Sporadically, a focus on university trained lawyers can also be encountered in England, for example in the study by Levack of civil lawyers, since for them a doctorate in civil law was a prerequisite.¹⁰ But in England such a limitation is less justified, since for most lawyers a university degree was not required. They were educated at the Inns of Court and Chancery, in an environment of practitioners. One should not, however, exaggerate the difference with the two universities that existed at that time, Oxford and Cambridge. The law school represented by the Inns of Court made use of an elaborate system of lecturing and was regarded by many as 'the third university of England'.¹¹

This does not cover the whole ground. Many young men went to university without getting a degree; many got legal training at a court without a formal examination. It is not easy to draw a line here: should they be regarded as 'jurists'?¹² It is difficult to say. The important thing is to admit that history does not really like the sharp divisions we scholars tend to construct, so for the purpose of this paper we had better include them as well. Another caveat, regarding the content of legal education, might be appropriate. Whether a lawyer went to an Inn of Court or to a university, the education he received was most likely of a broad nature, including history, diplomacy and languages.¹³ We should not necessarily think of legal education as we know it today, at least on the continent: a rather juridical-technical training.

With this broad definition of 'lawyers' we also avoid focusing on a group with a specific occupation.¹⁴ Karpik devoted his studies to the collective action of the French *avocats* and paid attention to their contribution to the process of

8 H. Lieberich, 'Die Gelehrten Räte. Staat und Juristen in der Frühzeit der Rezeption', in: (1963) 27 *Zeitschrift für bayerische Landesgeschichte*, pp. 120-189; and 'Klerus und Laienwelt in der Kanzlei der Baierischen Herzöge des 15. Jahrhunderts', in: (1966) 29 *Zeitschrift für bayerische Landesgeschichte*, pp. 239-258.

9 E. Genzmer, 'Kleriker als Berufsjuristen im späten Mittelalter', in: *Études d'histoire du droit canonique Gabriel le Bras* (2.), Paris (1965), pp. 1207-1236. W. Prest, 'Introduction' in: Id. (ed.), *Lawyers in early modern Europe and America*, London: Croom Helm (1981), pp. 11-15 (11), seems to suggest such a limitation.

10 B.P. Levack, *The civil lawyers in England 1603-1641. A political study*, Oxford: Clarendon Press (1973). B.P. Levack, 'The English civilians, 1500-1750', in: W. Prest (ed.), *op. cit.*, pp. 108-128.

11 J.H. Baker, 'The third university of England' in: Id., *The common law tradition. Lawyers, books and the law*. London: Hambledon (2000), pp. 3-28.

12 This question is also addressed by J.H. Baker, 'The English legal profession, 1450-1550' in: W. Prest, *op. cit.*, pp. 16-41.

13 *Ibid.*, p. 18.

14 The same broad definition is used by W.J. Bouwsma, 'Lawyers and early modern culture', (1973) 78 *The American historical review*, pp. 303-327 (305).

[166] state formation.¹⁵ Bell and Landon investigated the political role of those who were, or had been, involved in private litigation as barristers.¹⁶ Dawson devoted himself to the study of the role of judges as ‘the oracles of the law’.¹⁷ This is of course perfectly legitimate, since these scholars are specifically interested in the importance of members of those professions. The purpose here is to sketch a more general picture of the role of jurists, regardless of whether they had pursued an academic career, had been civil servants or had been active in yet another profession.

Let me now turn to the main question: in what ways did lawyers contribute to the formation of states by means of law? The scope of this paper of course does not allow me to answer this question extensively. What I will do is first give an impression of the various roles lawyers played in this process between 1100 and 1800, and then focus on their contribution to the introduction of a uniform (private) law in two European states: England and France.

3. Lawyers and their Contribution to the Process of State Formation: An Overview

The contribution of lawyers to states as we know them today is manifold. Karpik argues that in France lawyers were instrumental in the first phase of the process of state formation.¹⁸ In the late Middle Ages kings tried to foster their legitimacy, particularly in their struggle with the powerful nobility. *Avocates*, and more generally jurists either lay or clerical, proved very useful: they became important members of the king’s council. Legal training was especially important since court procedures tended to displace feuds. Conflicts between higher ranking persons were increasingly settled by law, instead of by force. The same is probably true of early Norman England, where the king became instrumental in solving disputes between his lords. From his council, the courts in Westminster Hall originated, giving opportunity to the judges to develop the common law. In Germany this process of ‘juridification’ of the king’s advisory councils can also be discerned, albeit somewhat later. In a sixteenth-century

15 L. Karpik, *French lawyers. A study in collective action 1274 to 1994*, Oxford: Oxford University Press (1999). See for an extensive overview of comparative sociological research into this profession, with a focus on the last two centuries: R.L. Abel & P.S.C. Lewis (eds), *Lawyers in society [3 volumes]*, Berkeley/Los Angeles/London: University of California Press (1988-1989).

16 D.A. Bell, *Lawyers and citizens. The making of a political Elite in Old Regime France*, New York/Oxford: Oxford University Press (1994). M. Landon, *The triumph of the lawyers. Their role in English politics, 1678-1689*, Alabama: University of Alabama Press (1970). Cf. also: L.R. Berlanstein, ‘Lawyers in pre-revolutionary France’, in: W. Prest (ed.), *op. cit.*, pp. 164-180; and S. Harty, ‘Lawyers, codification, and the origins of Catalan nationalism, 1881-1901’, (2002) 20 *Law and history review*, pp. 349-384 and 397-399.

17 J.P. Dawson, *The oracles of the law*, Ann Arbor: The University of Michigan Law School (1968).

18 Karpik (1999), *op. cit.*, pp. 15-32.

[167] book on the recruitment of counselors, rulers were advised to use lawyers: 'Fürsten müssen der Juristerei brauchen, gleich wie das Schwert'.¹⁹ The German kings and other rulers, secular as well as clerical, followed this advice and started to employ *Gelehrte Räte*, which of course furthered the reception of Roman law.²⁰ But the role of the lawyers at the highest level should not be overestimated. One has to realize that they were used by the king against a feudal nobility. They did not become leading politicians themselves. Jurists certainly occupied important positions and obtained the high social status that went with those positions, but they did not make the final political decisions. Most of the lawyers, as well as a considerable number of the other counselors, were for obvious reasons recruited from an intermediate social layer and consequently there must have been a considerable social gap between them and the nobility, which was difficult to overcome.²¹

This is probably also the reason why their prominent role proved to be temporary. After some time, the policy of the French kings was successful and the lawyers became dispensable, at least with regard to the high offices.²² From the sixteenth century onwards, the king increasingly relied for those offices on the now pacified nobility, which was much better suited to the culture of the king's court. This seems to be true for Germany as well.²³ Moreover, Stolleis shows that at least in the sixteenth and seventeenth centuries rulers were advised to use counselors of a more generalist educational background, with among other things a profound historical knowledge.²⁴ To be sure, law and lawyers were still necessary to the political councils of Germany, but their contribution was more legal-technical, instead of politically directing.²⁵

At another level, lawyers were also of crucial importance in the process that brought about the change from a violence-ridden society to a more peace-

19 'Princes should use lawyers, just like they use swords'. R. Lorch, *Wie junge fürsten, und grosser herrn kinder rechtschaffen instruirt und unterwisen (...) mögen werden*, Marburg (1537). Cited in M. Stolleis, 'Grundzüge der Beamtenethik (1550-1650)', in: R. Schnur (ed.), *Die Rolle der Juristen bei der Entstehung des modernen Staates*, Berlin/München: Duncker & Humblot (1986), pp. 273-302 (286).

20 P. Moraw, 'Gelehrte Juristen im Dienst der deutschen Könige des späten Mittelalters (1273-1493)', in: R. Schnur, R. (ed.), *op. cit.*, pp. 77-147; H. Lieberich, 'Gelehrte Räte', in: *Handwörterbuch zur deutschen Rechtsgeschichte (I)*, Berlin: Schmidt (1971), pp. 1474-1477; D. Stievermann, 'Die gelehrten Juristen der Herrschaft Württemberg im 15. Jahrhundert. in: R. Schnur (ed.), *op. cit.*, pp. 229-271; A. Kohler, 'Zur Bedeutung der Juristen im Regierungssystem der Monarchia universalis Kaiser Karls V.', in: R. Schnur (ed.), *op. cit.*, pp. 649-674.

21 Q. Griffiths, 'New men among the lay counselors of Saint Louis' Parliament', (1970) 32 *Mediaeval studies*, pp. 234-272 (234). Stolleis (1986), *op. cit.*, p. 283.

22 Karpik (1999), *op. cit.*, pp. 32-35.

23 N. Hammerstein, 'Universitäten – Territorialstaaten – Gelehrte Räte', in: R. Schnur (ed.), *op. cit.*, pp. 687-735 (734). Stolleis (1986), *op. cit.*, p. 298.

24 Stolleis (1986), *op. cit.*, p. 287.

25 D. Willoweit, 'Rat und Recht im Regiment des Großen Kurfürsten von 1648 bis 1658', in: R. Schnur (ed.), *op. cit.*, pp. 797-822.

ful one. 'Good justice', which meant just rules and correct, rational procedures, [168] became essential to the state, but it had yet to be invented. Since the state did not have the means to pay for the great number of experts necessary to provide this, the role of lawyers in litigation was vital. Procedures were adversarial, which implied that on both sides of conflict, whether of a private or public nature, private lawyers dominated.²⁶ So even in procedures of a criminal nature, the state was rather passive, leaving it to the lawyers of both sides to argue their case. Lawyers had to provide the actual content of 'justice'. As with their recruitment to high office, their dominant role at the level of court procedures also diminished as a result of its success, at least on the Continent.²⁷ The moment law and procedures were sufficiently developed, the state changed the rules of the game. Trials became increasingly inquisitorial, which meant that the influence of *avocats* diminished.

For a while, the French *avocats* acquiesced in the loss of their access to higher positions and focused on private litigation.²⁸ *Avocats*, and lawyers in general, were still of crucial importance to the state. Although we nowadays might tend to regard their role as merely 'technical', providing justice and solving conflicts remains a legitimizing factor even today. Moreover, many lawyers became civil servants in the slowly burgeoning bureaucracies. In seventeenth-century France the Crown became increasingly dependant on legally trained administrators, the so-called *intendants*.²⁹ The same is *mutatis mutandis* true for Germany and England.

The lawyers were, however, not ready to remain politically silent forever. In the seventeenth century, the kings started to strengthen their position on the basis of a theory of absolutism. In reaction, lawyers assumed the role of an opposing force. Lawyers were of eminent importance in the struggle [169] between king and parliament that dominated politics in seventeenth-century England.³⁰ They were instrumental in ensuring that the lawful powers of the Crown remained within the limits set by parliament and the common law as they interpreted it. But it should be mentioned that not all lawyers sided with the opposition to the Crown. Many presented a case for the king on the basis of the same common law, as did, for example, Francis Bacon (1561-1626), Lord Chancellor from 1618 to 1621.³¹ Moreover, it has been argued that the crisis that eventually led to the acceptance of the Bill of Rights in 1689 was initiated by members of the nobility.³² Lawyers stepped forward later and played a particularly important role in formulating and passing the claim of rights. Even in respect to this claim, they were divided; some lawyers opposed such a project

26 Karpik (1999), *op. cit.*, pp. 18-20 and 26-27.

27 *Ibid.*, p. 26.

28 *Ibid.*, 36-58.

29 C.W. Brooks, 'The common lawyers in England, c. 1558-1642', in: W. Prest (ed.), *op. cit.*, pp. 42-64 (58).

30 Landon (1970), *op. cit.*, pp. 248-250.

31 Brooks (1981), *op. cit.*, pp. 59-60.

32 L.G. Schworer, 'The role of lawyers in the Revolution of 1688-1689', in: R. Schnur (ed.), *op. cit.*, pp. 473-498 (474 and 491).

altogether. In eighteenth-century France, they also contributed substantially to the struggle between king and the *parlements*, claiming to represent 'the public'.³³ Eventually, they constituted a political elite that took leadership of the Third Estate during the first stages of the French Revolution.³⁴

Last but not least, lawyers proved to be instrumental in the legal integration within the various states. Once lawyers had successfully played their role as advisors, as providers of law and as solvers of conflicts, other demands were made. It was argued that conflicts should not only be solved peacefully according to laws, but also that these laws should be uniform in order to ensure coherence within a state. It is to the contribution of lawyers in this respect that I will now turn.

4. Two Processes of Legal Integration: England and France

In the various European countries different processes of legal integration can be discerned. Two of them are, however, of particular interest, since they represent two opposing ways of dealing with the problem of legal diversity. In England legal integration was brought about by judges at an early stage. It was achieved in the course of the twelfth century by means of a central court in Westminster which dealt with the administration of justice. No use was therefore made of a codification, and legal writings hardly played any role. In France, on the other hand, the legal profession had to deal with diversity of law for many centuries. Legal unity was only brought about at the beginning of the nineteenth century. Unlike in the English example, it was attained at one stroke by way of a codification. It is true that at the same time a central court was introduced. The most important task of this court was, however, not to realize legal unity, but to safeguard the already uniform provisions of the code. Notwithstanding considerable differences the development in most other Western European countries resembled the French example.

4.1 The English Example

England and Wales

In 1066, when William the Conqueror crossed the Channel and started to rule as king of England, the situation as to the law probably resembled, to a greater or lesser extent, the one on the continent. Local customary law prevailed and was applied by local judges in procedures that were mainly oral. The result was diversity of law, since each region had its own customs. But politically the situation in England was rather different from the continental one. As conquerors, the Norman kings were powerful rulers and their policies were not hampered by a constitutionally protected autonomy of the various regions. The

33 Karpik (1999), *op. cit.*, p. 59.

34 Bell (1994), *op. cit.*, p. viii.

result was extraordinary: England became the first European state to enjoy mone-[170]tary unity, an absence of internal tolls and even a sense of national togetherness.³⁵ In the course of the twelfth and thirteenth centuries, the institutions of William and his successors were also able to change the diversity of law. The royal courts in Westminster Hall proved to be of fundamental importance in this process.³⁶ In the beginning, the competence of these courts was limited. They only dealt with important conflicts, for example where the king was involved, or where taxes were the issue, or where important members of the nobility were litigants. As it turned out, these courts were providing fairly good justice. The judges were professionals; procedure was written and according to modern canonic and Roman measures. As a result, litigants sought in ever greater numbers to obtain justice from these courts, bypassing local judges.³⁷ Consequently, local customary law had become obsolete in England a century before Bracton wrote his treatise. By then, royal common law already provided England with 'a body of national law unique in Europe'.³⁸

I would like to emphasize three aspects of this specific process of attaining legal integration. Firstly, it was as far as we know not preceded by any formal decision. Complete legal unity was almost certainly not the aim when the courts in Westminster came into existence. It should be noted that at first the competence of these judges was limited to important disputes between the great and wealthy. Many of the cases before these judges had a fiscal dimension. Secondly, it was brought about by judges who were not politicians, but men who spent most of their time on the administration of the nascent common law.³⁹ Nor were these judges university trained men. Universities did not even exist at the early stages of the common law.⁴⁰ When in the twelfth and thirteenth centuries Roman law was rediscovered and taught at the then new universities of Oxford and Cambridge, these judges might have gathered some knowledge of Roman law, but basically they remained professionals who were trained in practice. Thirdly, the success of this process was due to the weakness of customary law at that time. Local customs did not amount to a corpus of modern law that was suited to deal with the complexities of an ever more dynamic society. It was not written, nor were its procedures up to the rational

35 B.P. Levack, *The formation of the British state. England, Scotland, and the Union, 1603-1707*, Oxford: Clarendon Press (1987), pp. 10-11, 17 and 20-21; J. Brewer, 'The eighteenth-century British state. Contexts and issues', in: L. Stone (ed.), *An Imperial State at War. Britain from 1689 to 1815*, London/New York: Routledge (1994), pp. 52-71 (61).

36 J.H. Baker, *An introduction to English legal history*, London: Butterworths (1990), p. 14; Dawson (1968), *op. cit.*, pp. 1-4.

37 The supremacy of the royal courts must be kept in perspective, though, as Brooks (1981), p. 42, argues. There were at least until the seventeenth century many other courts administering their specific laws, among which were the ecclesiastical courts.

38 Baker (1990), *op. cit.*, p. 149. Dawson (1968), *op.cit.*, p. 2.

39 Dawson (1968), *op. cit.*, p. 22.

40 *Ibid.*, p. 33.

standards that were raised by the examples of the developing canon law and the newly discovered Roman law. It was not an elaborated system, with the result that it did not [171] sufficiently cover areas of modern life. In short, it was not a sound legal system that was able to resist the justice of the king's courts.

The formal theory on the sources of the law was in accordance with the newly established central power. From the thirteenth century onwards, the authority of the central government, king and parliament to regulate matters of law by means of statutes was not disputed. This constitutes a major difference with the situation in France, as will be shown shortly. Although, however, it seems that during the reign of Edward I the statutory instrument was extensively used, in the end most of the law was to be made by judges.⁴¹ The scanty use of statutes in early modern England could be explained by the fact that another institution of central government, the courts in Westminster, already provided uniform law.

The reliance on the law made by the central courts might also account for the way in which Welsh law was integrated in the English common law.⁴² After the conquest of Wales in 1283, the English rulers were again confronted with legal diversity in their realm. Yet the local customs of Wales were not abolished. An attempt was made to codify some principles of English law and put these into force in Wales by means of statute, but these did not apply in all of Wales. Furthermore, the Westminster courts did not receive formal jurisdiction in the newly acquired territories. As a result Welsh customs continued for a while. In the end, however, English law as provided by the royal courts in Westminster proved to be very influential. This resulted in the disuse of local Welsh customs and after some time legal unity was arrived at in practice. Only in 1536 were they formally – and posthumously – abrogated.⁴³ Again, it was the weakness of the local customary legal system that enabled the development of a unified law.

Scotland

It is illuminating to compare this success story with the situation which resulted from the union between England and Scotland in the seventeenth and eighteenth centuries.⁴⁴ After the Union of 1604, which was a personal union, the new King James VI/I was confronted with legal diversity within his state, since England and Scotland had different legal systems. Not long after his ascendance to the throne of England, the King suggested to the House of Com-

41 M.S. Arnold, 'Statutes as judgments: the natural law theory of parliamentary activity in medieval England', (1977/1978) 126 *University of Pennsylvania Law Review*, pp. 329-343.

42 Baker (1990), *op. cit.*, p. 37.

43 *Ibid.*, p. 37. Until 1830, however, there was no unified jurisdiction. A special set of courts, the 'Great Sessions', operated alongside the English courts.

44 See on this union: W. Ferguson, *Scotland's relations with England: a survey to 1707*, Edinburgh: Donald (1977), pp. 97-116; Levack (1987), *op. cit.*, *passim*.

mons that legal unification of England and Scotland be brought immediately by means of a codification.⁴⁵ It was clear that this radical plan was initiated for [172] political reasons: it was closely linked to the wish of the King to establish a lasting union between the two kingdoms. Not surprisingly, there was much opposition to the attempts to realize legal unity. The Scottish Parliament, for example, severely limited the competence of its members of the commission charged with the negotiations on a treaty between England and Scotland. Some politicians and writers, both English and Scottish, pointed out that the attempt to realize complete legal unity was not only unnecessary, but also dangerous.⁴⁶ Even those who were convinced that unification of the laws of England and Scotland was imperative in order to strengthen the union did not necessarily support the idea of an immediate codification.⁴⁷ In particular, some English advocates of legal unity expected that this unity would gradually emerge, in accordance with the previous example of the integration of Welsh law into English law.⁴⁸ By 1608, it had become clear that as a result of the political opposition on the one hand and of the vision of attaining legal union gradually on the other, nothing would come of the plans of James VI/I.

The gradual integration of Scottish law into English law did not, however, occur. On the contrary, in the seventeenth century Scottish law seems to have developed into a more or less complete legal system in its own right, with much resemblance to the family of civil law.⁴⁹ Instrumental in this respect were the writings of Sir James Dalrymple of Stair, whose *Institutions* (1681) is often said to have 'marked the creation of Scots law as we have since known it'.⁵⁰ In view of the continued legal diversity it is probably not surprising that the project for a legal union between the two countries was revived in the 1650s, after the defeat of the Scots by Oliver Cromwell, and again in 1664 and

45 B. Shapiro, 'Codification of the laws in seventeenth century England', (1974) 2 *Wisconsin Law Review*, pp. 428-465 (438-441). P.A.J. van den Berg, 'De rol van rechtswetenschap en *raison d'état* bij het streven naar codificatie in Engeland, 1530-1625', (1999) 16 *Groninger opmerkingen en mededelingen*, pp. 1-42 (20-21 and 36-39); the essay is also available at: <https://dare.ub.rug.nl/handle/1931/1756>.

46 This view was expounded by T. Craig, a Scottish member of the commission who had studied civil law in France, and by F. Bacon, one of the English members of the commission. *Ibid.*, pp. 21-28.

47 B.P. Levack, 'The proposed union of English law and Scots law in the seventeenth century', (1975) *Juridical Review. The Law Journal of Scottish Universities*, pp. 97-115 (102-105).

48 T.B. Smith, 'The interaction of Scots law and English law in historical perspective', in: P. Wallington & R.M. Merkin (eds), *Essays in memory of professor F.H. Lawson*, London: Butterworths (1986), pp. 133-144 (134-135). Van den Berg (1999), *op. cit.*, pp. 29-32.

49 W.M. Gordon, 'Roman law in Scotland', in: R. Evans-Jones (ed.), *The civil law tradition in Scotland*, Edinburgh: The Stair Society (1995), pp. 13-40, and P. Birks, 'The foundation of legal rationality in Scotland', in: R. Evans-Jones (ed.), *The civil law tradition in Scotland*, Edinburgh: The Stair Society (1995), pp. 81-99.

50 A. Murdoch, 'The advocates, the law and the nation in early modern Scotland', in: W. Prest (ed.), *op. cit.*, pp. 147-163 (149).

1670, but nothing of these projects materialized.⁵¹ A final effort at attaining legal unity was made in 1707, when the separate kingdoms of England and Scotland were by treaty [173] united into one Kingdom of Great Britain.⁵² Although a union of English and Scots law was on the mind of at least some politicians in circles of government, Articles 18 and 19 of Union specifically reserved to Scotland the laws and judicatures concerning private rights, which were not to be subject to incorporation.⁵³

The treaty seemed to imply a different way of arriving at legal unity. According to it, the new kingdom would know only one Parliament, the Parliament of Great Britain. Sixteen Scottish peers were to sit and vote in the House of Lords of this Parliament. It was clear that this House of Lords was to continue to exercise an appellate jurisdiction over English superior courts.⁵⁴ Its position *vis-à-vis* the Scottish judicature was less clear. As in England, the abolished Scottish Parliament used to have jurisdiction over Scottish courts. The Articles of Union did not, however, provide for a court to replace it. Soon after the start of the Union on 1 May 1707, it became evident that the House of Lords of the new, British parliament was to deal with appeals from the (Scottish) Court of Session as well, and that these appeals were to be handled according to Scottish law. As McLean argues, most of the commissioners were aware of the fact that this would happen.⁵⁵ The English members did not object because they were mostly in favor of legal union. Why did the Scottish members not insist on a provision in the Treaty of Union that would have prevented this from happening? After all, they were warned by contemporary writers against the ‘danger of Scots law becoming English law “by the secret and certain operation of time”’.⁵⁶ Moreover, among the thirty-one Scottish commissioners were nine eminent lawyers, whose influence on the Articles of the treaty affecting the laws and judicatures of Scotland would have been decisive.⁵⁷ As McLean shows, the answer to this question is that they feared the alternative: the introduction of a new, Scottish based appellate court that would be under the influence of the Crown. They preferred the House of Lords, which they thought would receive few cases from Scotland because of the physical distance. Consequently, the erosion of Scottish law was regarded as unlikely.⁵⁸

In a way they were to be proved wrong. Scottish law has been strongly influenced by English law and – to a much lesser extent – vice versa.⁵⁹ Accord-

51 Levack (1975), *op. cit.*, pp. 112-114.

52 See on this union: Ferguson (1977), *op. cit.*, pp. 232-277.

53 A.J. MacLean, ‘The 1707 Union: Scots law and the House of Lords’, (December 1983) 4(3) *Journal of legal history*, pp. 50-75 (51 and 67).

54 MacLean (1983), *op. cit.*, p. 50.

55 *Ibid.*, p. 69.

56 *Ibid.*, p. 68.

57 *Ibid.*, pp. 52-53.

58 *Ibid.*, p. 69.

59 The famous decision of the House of Lords in *Donoghue v Stevenson*, [1932] *All English Law Reports* (reprint), pp. 1-32, was a Scottish case, but has proved semi-

ing to Evans-Jones, some judges in the House of Lords clearly saw the practicality of relying sometimes on the traditions of both Scotland and England for the formation of one law for Britain.⁶⁰ The strategy to bring about complete legal union by means of a single Supreme Court, however, failed up to the present: the two legal systems are still quite distinct today.⁶¹ The failure to achieve legal unity might very well have resulted from the fact that around 1700, Scottish law had already become an elaborated legal system which was able to successfully resist a take-over by English common law. After the departure of the Parliament in 1707, Scottish legal institutions such as the Court of Session and the Faculty of Advocates became the public and political forum of the nation, not unlike the *parlements* in eighteenth-century France.⁶² The eighteenth century has even been called by some the 'golden age of Scots law', in which it was able to develop in harmony with the *ius commune* of continental Europe.⁶³ The establishment of a new Scottish Parliament in 1999 with its own legislative competences might in the future add to the distinctiveness of Scots law. The example of the legal history of Great Britain seems to lead to the conclusion that the English process is successful only when it is applied to a relatively weak legal system.

4.2 France

The kings of France were not as powerful as the Norman kings. Feudal disintegration had been more profound than in England. The French kings were to a certain extent constitutionally bound to respect the autonomy of the various regions. It is true that after the kings had reestablished themselves, they enjoyed an increasing political authority. At the end of the thirteenth century, there even developed out of the *Curia Regis* a central court, the *Parlement de Paris*.⁶⁴ The exact constitutional position of the king was, however, constantly debated in the centuries to come. The king might have had the power and the opportunity to change at least partly the local *coutumes*, but for one reason or

nal for English law. Smith (1986), *op. cit.*, p. 143; R. Evans-Jones, 'Civil law in the Scottish legal tradition', in: Id. (ed.), *The civil law tradition in Scotland*, Edinburgh: The Stair Society (1995), pp. 3-12 (6-7).

60 R. Evans-Jones, 'Roman law in Scotland and England and the development of one law for Britain', (1999) 115 *Law Quarterly Review*, pp. 605-630 (606). See for a fierce opposition to the influence of English law on Scottish law: T.B. Smith, 'Strange Gods: the crisis of Scots law as a civilian system', (1959) 4 *Juridical Review: the law journal of the Scottish universities*, pp. 119-141.

61 The law of Scotland is usually presented as an example of a mixed legal system, being influenced by both the civil law and the common law tradition. D.L. Cary Miller, 'A Scottish celebration of the European legal tradition', in: D.L. Carey Miller & R. Zimmermann (eds.), *The civilian tradition and Scots law*, Berlin: Duncker & Humblot (1997), pp. 19-51.

62 Murdoch (1981), *op. cit.*, p. 152.

63 *Ibid.*, p. 137.

64 Dawson (1968), *op. cit.*, pp. 267 and 273-277.

another he did not fully exploit their initial weakness.⁶⁵ On the contrary, the king chose to order the description of the local customs in order to provide sound justice. From the fifteenth century onwards, therefore, local governmental bodies were [175] working together with representatives of the king on a written text of the *coutumes*.⁶⁶ Since the king offered to approve the result and to make the publication official by authorizing it, he was able to realize considerable harmonization. In particular, the Canon law doctrine that customs which were contrary to principles of justice, the so-called 'unreasonable customs', could be changed was of great help. In the long run, however, the result was a fundamental legal diversity that was rather difficult to change. Whatever the precise status of local customs in the thirteenth and fourteenth centuries, from the fifteenth century onwards they became increasingly regarded as a part of the constitutionally guaranteed autonomy of the various provinces.⁶⁷ This was especially true for customs regulating matters of private law. The provincial *parlements* that were created since the middle of the fifteenth century were quick to assume their role as guardians of this 'privilege'.⁶⁸ It is true that in the seventeenth century royal *ordonnances* provided some legislation at a national level, but their scope was rather limited. Furthermore, these *ordonnances* did not automatically prevail over the local customary law, at least not in the seventeenth and eighteenth centuries.⁶⁹ Consequently, it would take about three centuries before the diversity of law in France was replaced by legal unity. In this cumbersome process three phases can be discerned. In the first phase, which started in the sixteenth century, the so-called *coutumiers* took the lead. In the course of time, another type of lawyer contributed much to the development of a *droit commun*: the systematizer. In the final phase the accomplishments of the preceding centuries were transformed by the codifiers and put into the *Code civil* of 1804.

65 *Ibid.*, pp. 269 and 347.

66 The process has been described by J.P. Dawson, 'The codification of the French customs', (1940) 38(6) *Michigan Law Review*, pp. 765-800; R. Filhol, 'The codification of customary law in France in the fifteenth and sixteenth centuries', in: H.J. Cohn (ed.), *Government in reformation Europe, 1520-1560*, London: Macmillan (1971), pp. 265-283; and R. Filhol, *Le Premier Président Christophe de Thou et la réformation des coutumes*, Paris: Librairie du 'Recueil Sirey' (1937).

67 Dawson (1940), *op. cit.*, pp. 791-795; J. Krynen, 'The absolute monarchy and the French unification of private rights', in: J. Kirshner & L. Mayali (eds), *Privileges and rights of citizenship, Law and the juridical construction of civil society [studies in comparative legal history]*, Berkeley: Robbins Collection (2002), pp. 27-55, argues that the king did have absolute authority to change customary law. He uses, however, mainly writers from the thirteenth and fourteenth centuries as evidence, and seems to disregard the developments in the early modern era.

68 Dawson (1968), *op. cit.*, pp. 278, 298 and 309. The first of these provincial *Parlements*, the *Parlement de Toulouse*, was created in 1443.

69 *Ibid.*, pp. 307 and 364-366.

Coutumiers

Immediately after the homologation or authentication of the local *coutumes*, a process that was successfully completed somewhere in the early sixteenth century, commentators started to interpret them. There were many of these *coutumiers*, since there were many different clusters of customary law. Some of them are quite famous, for example Charles Du Moulin (1500-1566). Du Moulin had studied law at the University of Poitiers, and spent most of his professional days as a barrister in Paris. Others are hardly known even to legal historians, for example Joseph Boucheul (1639-1706), who was an *avocat* at the court of Dorat, a town in the Haut Limousin. I will now describe the way these two *coutumiers* operated.

It is important to realize that a specific local customary legal system constituted the core of their writings. The *Coutumier general* of Boucheul, published in 1727, was in fact a comment on the approximately 200 articles of the customs of Poitou in a numerical order. Boucheul started by giving the text of an article and subsequently elaborated on it very extensively. He sometimes needed more than 30 pages to comment on just one article. One of the reasons that it took him so many pages was that he also described in detail the matter at hand according to the law of the other regions of France, as well as according to Roman law. Obviously, the local customs were interpreted not just on the basis of the text and of the practice of the local courts. *Coutumes* of other regions and their application by the competent courts, as well as Roman law, were also considered relevant in this respect. The same is true of Du Moulin, whose commentary on the *Coutume de Paris*, parts of which were published from 1539 onwards, bears witness to a profound knowledge of the *coutumes* of the various regions of France.⁷⁰ It was really a work of comparative law: Du Moulin did not fail to mention in what respect the other *coutumes* were different from the *Coutume de Paris*.

In this context it is crucial to emphasize that both Du Moulin and Boucheul were in the first place practitioners, although they had studied law at a university in their early days.⁷¹ In France, universities were not important with regard to the practice of law anyway, partly due to the fact that only Roman law and canon law was taught. The first chair in French law was established as late as 1679. Consequently, the law schools had already been in decline for a long time.⁷² Furthermore, it is clear that they wrote their books for a market that mainly consisted of practitioners, that is *avocats* and judges. So obviously, there was an urgent practical need for books of this kind.

The practical relevance of this kind of book can only be understood when one realizes that even with the homologation of the local customs, customary

70 J.-L. Thireau, *Charles du Moulin (1500-1566). Etude sur les sources, la méthode, les idées politiques et économiques d'un juriste de la Renaissance*, Genève: Droz (1980), pp. 120-121.

71 Dawson (1968), *op. cit.*, pp. 342-345.

72 *Ibid.*, p. 340.

law was still deficient.⁷³ It was not yet the modern legal system needed to cope with the complexities of a modernizing society. One just has to look at the order of Boucheul's commentary to find out that it was not 'a system' at all. Many legal questions, therefore, could simply not be answered on the basis of local customary law alone. This deficiency was reflected in the then existing theory of sources of law. Although the regional customs were regarded as the primary source of law, partly due to the constitutional state of affairs, secondary [177] sources were also admitted in the provincial courts. It became accepted that in the case of uncertainty or *lacunae*, recourse should be made to the customary law of neighboring regions. If an acceptable solution was still not available, Roman law was regarded as having persuasive authority. It can be concluded that notwithstanding their authorization by the king, local *coutumes* were still relatively weak. They seem to have been, in more modern terms, somewhere between hard law and soft law.⁷⁴ Provisions of the customary law of other regions and of Roman law were also acceptable, on account of their intrinsic value.

Droit Commun Français

It is not difficult to understand why this situation led to *coutumes générales* and eventually to something that could be called a 'droit commun français'.⁷⁵ There was a strong practical need for the discipline known today as comparative law. Moreover, one of the essential stages in the process of comparing various law systems is, according to Zweigert and Kötz, the development of general legal concepts suited to encompass and describe both systems.⁷⁶ Lawyers who tried to systematize the material provided by the *coutumiers* made an important contribution to the development of these concepts. To be sure, *coutumiers* kept on writing and publishing their books until the end of the *Ancient Régime* and they certainly tried to put matters in some order, but they had company from lawyers who wrote more systemized treatises on the *droit commun français*. The generalized *coutumes* were now put in a rather systemized order, sometimes using the divisions provided for by Roman law. In this way,

⁷³ *Ibid.*, p. 273.

⁷⁴ See on the concepts of 'soft' or 'default' law and 'hard' or 'firm' law: P. Sarcevic, 'Unification and "Soft law"', in: *Conflits et harmonization. Mélanges en l'honneur d'Alfred E. von Overbeck*, Fribourg: Editions Universitaires Fribourg Suisse (1990), pp. 87-101; and U. Mattei, 'Hard code now!', (2002) 2(1) *Global jurist frontiers*, Article 1. <http://www.bepress.com/gj/frontiers/vol2/iss1/art1/>.

⁷⁵ E. Meynal, 'Remarques sur le rôle joué par la doctrine et par la jurisprudence dans l'oeuvre d'unification du droit en France', (1903) *Revue générale du droit*, pp. 326-351 en 446-457, illustrates this process using the development of the law of inheritance, especially regarding the so-called 'propres'. The concept of a 'droit commun' can already be encountered in France as early as the 14th century. P. Petot, 'Le droit commun en France selon les coutumiers', (1960) *Revue historique de droit français et étranger*, pp. 412-429.

⁷⁶ K. Zweigert & H. Kötz, *Introduction to comparative law*, Oxford: Oxford University Press (1998), p. 44.

general rules of law were developed that fitted into a legal system. Let me just mention two famous authors R.-J. Pothier (1699-1772), who had studied law at the university of Orléans, and F. Bourjon (+1751), *avocat* at the Parlement of Paris from 1710.

Pothier, who started working as a judge but became professor of law in 1750, wrote a commentary on the *Coutumes d'Orléans* in 1740.⁷⁷ Although a specific customary legal system was taken as a point of reference, it is interesting to note that Pothier started with a scholarly, lengthy exposé on each title on [178] the basis of Roman law, the writings of Du Moulin and the *Coutumes* of various regions. The text of the provisions of the *coutumes* that were placed behind this introduction seem to have been hardly more than an appendix.⁷⁸ Bourjon was even more radical. In 1747 he published a book with the significant title: *Le droit commun de la France, et la coutume de Paris réduits en principes*. It was arranged in a strict order, dividing the legal material into books, titles, sections and paragraphs. Although it paid a lot of attention to the *Coutume de Paris*, it did not reflect a specific legal system that was applied by courts somewhere in France. This approach might have somewhat limited the immediate practical relevance of the book. Bourjon at least felt obliged to answer in the introduction the prospective objection that his book would be of scientific relevance only, especially interesting to legal scholars. It was nevertheless a commercial success: a third edition was published in 1773. The finest hour of these two more scholarly legal studies was, however, still to come. Precisely because of the less practical, more abstract nature of their works these two authors were extensively used by the codifiers, with the somewhat paradoxical result that they exerted the greatest influence on the French civil code of 1804, still in force today.⁷⁹

Codification

It should be made clear from the outset that although some kind of *droit commun français* had been developed over the course of time, France did not enjoy legal unity at the eve of the French Revolution. Firstly, local customary law was still constitutionally protected and consequently the formal status of the *droit commun*, but also of the *royal ordonnances*, was relatively weak.⁸⁰ Secondly, the *droit commun* had only substantial authority in northern France, in the *pays de droit coutumiers*. In the southern *pays de droit écrit* another legal system reigned, more influenced by Roman law. To put an end to this double diversity, a rather radical break was needed that would change the constitu-

⁷⁷ A second edition was published in 1760.

⁷⁸ In a later edition of his *Coutumes d'Orléans* (= *Oeuvres de Pothier* I) Paris (1817) title 10 (containing some 26 paragraphs) covers 19 pages, whereas Pothier needed 87 pages for the preceding introduction.

⁷⁹ F. Olivier-Martin, *Histoire du droit Français des origines à la Révolution*, Paris: CNRS (1948), pp. 425-426; A.-J. Arnaud, *Les origines doctrinales du Code civil français*, Paris: Pichon & Durand-Auzias (1969), pp. 104-106, 111-114 and 218-220.

⁸⁰ Dawson (1940), *op. cit.*, pp. 790-795.

tional state of affairs. It became clear that such an upheaval was fundamentally a political matter. As it turned out, it even took a revolution to bring about the necessary changes. One of the most important credos of the revolutionaries of 1789 became the necessity of a unitary state and therefore politicians were adamant in their plea for a uniform law.⁸¹ In the course of the revolution, legal unity was increasingly considered to be a matter of *raison d'état*. The obvious instrument [179] to bring about legal unity was a codification such as the *Code civil*. An important feature of that codification was and still is its exclusive force. With the introduction of this civil code all other sources of law, whether customary law or Roman law, were abolished. From that moment statutes, the written rules authorized by the government, reigned supreme. Thus codification became a central element of the process of state formation. Not surprisingly, the idea gained the support of leading politicians such as Sieyès and Napoléon, neither of whom were lawyers. Codification finally became feasible.

The decision to codify French law was therefore clearly a political one, based on arguments derived from the *raison d'état*. Only after that decision was made, did lawyers come to the fore again.⁸² Although a lot of work had been done in the previous centuries, their task was far from easy. They not only had to forge into a single whole the diverse customs of the various regions of France, but they also were confronted with a division between the *pays de droit coutumiers* in northern France, and the *pays de droit écrit* in southern France, where Roman law had been more influential. In the end, four great lawyers managed to produce a draft of a codex that in 1804 became the civil code. All four of them were practitioners. J.-E.-M. Portalis (1745-1807), J. de Maleville (1741-1824), F.D. Tronchet (1726-1806) and F.J.J. Bigot de Préameneu (1747-1825) had all spent most of their time as *avocats*. The role of university scholars was again very limited, which is consistent with the – already noted – relative unimportance of universities for legal practice.

The role of universities was to change dramatically after the introduction of the civil code, however. We have to realize that the professionals that had to apply the law, judges and *avocats*, were still thinking in terms of old law. Of course, the legislator tried to bully them into focusing on the provisions of the code, but he was only partly successful in this respect. It has been established that judges continued to apply the law as they knew it for at least some dec-

81 P.A.J. van den Berg, 'Politics, principles and the law. Or how a European codification will affect our legal systems' in: *Hanse Law School Cahier 2* Bremen/Groningen/Oldenburg: Hanse Law School (2001), pp. 107-123 (109-111); the essay is also available at: http://recht.nl/doc/european_codification/doc.

82 The same is true of the codification projects in other European countries. See for the Austrian-Hungarian Empire and The Netherlands: P.A.J. van den Berg, *Codificatie en staatsvorming. De politieke en politiek-theoretische achtergronden van de codificatie van het privaatrecht in Pruisen, de Donaumonarchie, Frankrijk en Nederland, 1450-1811*, Groningen: Wolters-Noordhoff (1996). See for the – failed – attempt at a unifying codification in Poland in the sixteenth century: K. Sojka-Zielinska, 'Le rôle des juristes dans le mouvement de la codification du droit en Pologne à l'époque de la Renaissance', in: R. Schnur (ed.), *op. cit.*, pp. 191-203.

ades.⁸³ This is where the universities, established by Napoléon, became important. At the universities law was increasingly taught in strict accordance with the new civil code. Some scholars realized that they were cutting themselves off [180] from 'law' in the broader sense of 'justice', and they sometimes deplored that, but they nevertheless felt obliged to teach law on the sole basis of the *code civil*. They became adherents of what has been called the 'school of exegesis'.⁸⁴ This proved to be instrumental for the success of the French civil code.

5. Law, Lawyers and the European 'State'

Now it is time to assess the significance of the contribution of lawyers to legal integration for the development of the Euro-[181]pean Union (EU). It has become quite clear that at least since the time Bracton wrote his treatise, arms and laws were of equal importance to the developing states of Europe. The EU seems to take a somewhat different route. It obviously lacks 'weapons': it has neither an army, nor a police force to speak of. It should not surprise us, therefore, if laws, and consequently lawyers, play a more significant role in the formation of this union than in the earlier cases of state formation. Profound descriptions of this – probably predominant – role of law in the EU can of course be found by the other contributors to this volume. I will only point to some possible parallels between the historical function of law and lawyers and the present use of law and lawyers in the context of the EU. Again, most attention will be devoted to the role of lawyers in the unification of private law.

5.1 Lawyers and the European State: An Overview

At least three possible parallels deserve some attention in this paragraph. Firstly, it was fundamental to the development of the early European states that they were able to present themselves as providers of better justice. These new states were not only increasingly successful in enforcing legal decisions, but they also emphasized the higher, more reasonable nature of their justice. This development was of course detrimental to local entities. Local courts and customary law were slowly but surely dismantled. The nascent European state could also use this strategy and try to directly win the hearts and minds of the

83 J. Gordley, 'Comparative legal research and its function in the development of harmonized law. An American perspective', in: N. Jareborg (ed.), *De Lege. Towards universal law: trends in national, European and international lawmaking*, Uppsala: Iustus Förlag (1995), pp. 37-53 (39); H. Kooiker, *Lex scripta abrogata. De derde renaissance van het Romeinse recht: een onderzoek naar de doorwerking van het oude recht na de invoering van civielrechtelijke codificaties in het begin van de negentiende eeuw (I): uitwendige ontwikkeling*, Nijmegen: Ars Aequi Libri (1996).

84 Van den Berg (2001), *op. cit.*, pp. 113-114.

European people. It is not difficult to notice the efforts to incorporate the European Convention on Human Rights and the consequent case law into the system of the European Union. It started with the application of these human rights on the basis of Article 6 (2) EU.⁸⁵ The next step was the proclamation of the Charter of Fundamental Rights of the European Union in December 2000.⁸⁶ The final stage should be the adoption of the European Constitution, which would effectively integrate these human rights within the treaty system of the European Union.⁸⁷ All this could have the effect that the EU morally surpasses the member States. Obviously this would be detrimental to the moral authority of the member States as supreme providers of justice. Such a strategy of course gives a rather political dimension to the role of lawyers in both the European Court of Human Rights and the European Court of Justice (ECJ). The contribution of Solanke to this volume, describing the efforts of lawyers of a network of NGOs to combat racial discrimination, seems to provide us with a fine example of the importance of the concept of justice for the emerging European State. As Solanke points out, it is rather significant that these lawyers have chosen to target the European Commission in an effort to bring about a so-called Race-Directive. It is less surprising that their efforts were quickly supported by another European institution: the European Parliament.

The attention devoted to consumer protection and product liability by institutions of the European Union should perhaps also be seen in the perspective of a Union as a provider of justice. This might be true as well for the vast amounts of environmental legislation, mentioned in Stout's contribution to this volume. The European Union is proving its existence with an enormous amount of legislation, on an ever-increasing number of fields. These efforts of the Union are necessarily reflected by the employment of many lawyers. It is obvious that they are of great importance in the European bureaucracy. Stout clearly shows that these lawyers in European employment have accelerated this development, at least in the field of the environment. They tend to create work for themselves, resulting in even more legislation. 'I legislate, therefore I am' seems to have become the credo.

Secondly, in periods of major constitutional change such as the English seventeenth century, lawyers clearly gained tremendously in political relevancy. Especially in the 'Aufbaufase eines neuen Staates', that is in a state under construction, they were instrumental in answering political questions in a

85 P.J.G. Kapteyn, 'De reikwijdte van het Handvest van de grondrechten van de Europese Unie als onderdeel van een Grondwet voor Europa', (2004) 165(3) *Rechtsgeleerd Magazijn Themis*, pp. 111-119 (112).

86 Publ. EC 2000/C 364/01.

87 See Part II of the Draft Treaty establishing a Constitution for Europe. This approach was already advocated by K. Lenaerts & E. de Smijter, 'A "Bill of Rights" for the European Union', (2001) 38 *Common Market Law Review*, pp. 273-300, with a clear reference to the constitutional process in the United States of America. Cf. also A. von Bogdandy, 'The European Union as a human rights organization? Human rights and the core of the European Union', (2000) 37 *Common Market Law Review*, pp. 1307-1338.

quasi-legal context.⁸⁸ The constitutional uncertainty resulting from the developing European state has again pushed lawyers to the fore. The role of lawyers is of course instrumental where vital documents are prepared, such as treaties. Undoubtedly, their influence on the wording of the recent proposal for a new European constitution has been great. Moreover, they become even more important when such treaties come into force. Then, they will have to discuss and decide many legal questions of a clearly political nature. What is the precise content of the legislative and other competences that have been attributed by the consecutive treaties to the European institutions? What exactly is the status [182] of regulations and directives? How detailed are they allowed to be and what are the consequences for the (concurrent) competences of the member States?⁸⁹ There is no doubt that the lawyers of the ECJ are of primordial importance in this respect.⁹⁰ At least some decisions of this Court cannot be regarded as merely legal-technical. I only have to mention the well-known case *Van Gend and Loos*, in which the Court decided that, with the treaty of Rome, a new legal order had been created, surpassing the various national legal orders of the member States.⁹¹ Schepel and Wesseling have argued that these judicial policies are embedded in a rather homogeneous community of writers on European law.⁹² Interestingly, this kind of 'judicial activism' is sometimes defended by stating that to ensure individuals 'a maximum of judicial protection' belongs to the 'core of any judicial activity'.⁹³ Governments of member States are now fully aware of the importance of the decisions of the ECJ and participating in them has become a preferred means to influence the direction of case law, as is recently shown by the research of Granger.⁹⁴

88 Cf. Stolleis (1986), *op. cit.*, p. 283.

89 U. Blaurock, 'Wege zur Rechtseinheit im Zivilrecht Europas', in: C. Starck (ed.), *Rechtsvereinheitlichung durch Gesetze – Bedingungen, Ziele, Methoden*, Göttingen: Vandenhoeck & Ruprecht (1992), pp. 90-116 (109).

90 See on the role of the ECJ with regard to legal integration: A.-M. Burley & W. Mattli, 'Europe before the Court: a political theory of legal integration', (1993) 47(1) *International Organization*, pp. 41-76, and the subsequent discussion: G. Garrett, 'The politics of legal integration in the European Union', (1995) 49(1) *International Organization*, pp. 171-181 and A.-M. Slaughter & W. Mattli, 'Law and politics in the European Union. A reply to Garrett', (1995) 49(1) *International Organization*, pp. 183-190.

91 Case 26/62, *NV Algemene Transport en Expeditie Onderneming van Gend en Loos v Nederlandse administratie der belastingen*, [1963] ECR 1. As G. Davies, *Nationality discrimination and free movement law*, Groningen (2002), p. 161, rightly remarks, this case shows that the Court 'considers it has competence-competence to go as far in interpretation as it wishes'.

92 H. Schepel & R. Wesseling, 'The legal community: judges, lawyers, officials and clerks in the writing of Europe', (1997) 3(2) *European law journal*, pp. 165-188.

93 W. van Gerven, 'Community and national legislators, regulators, judges, academics and practitioners: living apart together?', in: B.S. Markesinis (ed.), *Law making, law finding and law shaping: the diverse influences [The Clifford Chance Lectures 2]*, Oxford: Oxford University Press (1997), pp. 13-35 (28).

94 M.-P.F. Granger, 'When governments go to Luxembourg ... The influence of governments on the Court of Justice', (2002) 29(1) *European Law Review*, pp. 3-31.

A third historical parallel could be discerned in the context of the opposition to the development of the EU into a true state. Lawyers might assume an important role here, as they did in the seventeenth and eighteenth centuries against the emerging royal absolutism. For a long time, most national lawyers have been rather indifferent to the constitutional developments that have accompanied the growth of the European Union. It seems that only the proposal for a European Constitution has been able to incite a more fundamental discussion. This could also result in a more profound opposition, questioning the legal basis of a supposed transfer of sovereignty from the member States to the Union. Lawyers and particularly judges in the national courts are of vital importance in this respect, since the implementation of European law is ultimately in their hands. Alter argues that they have by and large been supportive of ECJ policies.⁹⁵ It has also been suggested, however, that some national courts are showing signs of resistance, for example in the context of Art. 234 (=177 old) EC. This provision obliges the highest national court to have questions relating to the construction of the Treaty answered by the ECJ. As Urban argues, the European Court has for obvious reasons tried to limit the discretionary freedom of national courts in this respect.⁹⁶ National courts were not to become 'full players' with regard to the interpretation of the Treaty. But as Blaurock points out, the German *Bundesgerichtshof* has since the 1980s been trying to avoid putting prejudicial questions to the European Court.⁹⁷ Resistance within the German judiciary to the supremacy of the ECJ also became manifest in 1994, in a much discussed decision of the *Bundesverfassungsgericht*.⁹⁸ In that ruling, the German Constitutional Court denied that the ECJ could legitimately be held to have competence over its own competence.⁹⁹

5.2 Lawyers and the Unification of European Private Law

Since in this paper the focus has been on the contribution of lawyers to legal integration by means of a uniform (private) law, let me dedicate some final remarks to this issue. I have described two processes in which lawyers acted as providers of uniform law, an English and a French process. What is the relevance of these processes for the development of a unified European private law?

⁹⁵ K.J. Alter, 'The European Court's political power', (1996) 19(3) *West European politics*, pp. 458-487.

⁹⁶ N. Urban, 'One legal language and the maintenance of cultural and linguistic diversity?', (2000) 8 *European Review of Private Law (ERPL)*, pp. 51-57. He refers specifically to case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of health*, [1982] ECR 4315.

⁹⁷ Blaurock (1992), *op. cit.*, pp. 109-110.

⁹⁸ *Entscheidungen des Bundesverfassungsgericht* 89 Tübingen, (1994), pp. 155-213.

⁹⁹ Cf. N. MacCormick, 'The Maastricht-Urteil: sovereignty now', (1995) 1(3) *European Law Journal* 1/3, pp. 259-266.

The English Scenario

The English scenario would require a central European court, for example the ECJ, which would increasingly be involved in matters of private law. Not many writers have proposed this scenario as a probable way of arriving at a unified European private law, with perhaps the exception of Van Gerven.¹⁰⁰ Of course, the idea of a central European Court with competence in matters of private law [184] has been put forward, but usually as a necessary complement to that other way of achieving legal unity: codification.¹⁰¹ Lando, the well-known chairman of the commission that brought about the general rules of Contract Law (the so-called PECL), even explicitly refers to the failure of realizing legal unity between England and Scotland to stress the importance of a codification.¹⁰² Riedl, however, seems to hope that the European judiciary will play such a major role in bringing about the Europeanization of private law, using the PECL as formulated by the Lando commission.¹⁰³ Whether this is a viable option is rather questionable. The historical example of England shows that this scenario is particularly successful when the legal systems that have to be replaced are relatively weak. Only 'soft' local English and Welsh legal systems gave way to the law of the Westminster courts. Already in the seventeenth century, the Scottish legal system proved to be too developed to be swept away by such a method. The various legal systems of the member states of the EU are much more developed than the Scottish system at that time. Moreover, they are supported by powerful institutions such as national courts and bar associations, and often even codified. Finally, it should be emphasized that the European Court does not have the political backing it would need to assume a greater competence over conflicts of a private law nature.

The French Scenario

The French scenario of unifying private law is more complicated and therefore its application to Europe needs more attention here. Essentially, it should consist of two elements. The first requirement would be the development of a European *droit commun* by means of an extensive use of the methods of com-

100 W. van Gerven, 'The ECJ case-law as a means of unification of private law?', in: A.S. Hartkamp, et al. (eds), *Towards a European civil code* 2, Nijmegen: Ars Aequi Libri (1998), pp. 91-104; and Id., 'The case-law of the European Court of Justice and national courts as a contribution to the Europeanisation of private law', (1995) 3 *ERPL*, pp. 367-378.

101 Both W. van Gerven, 'A common law for Europe: The future meeting the past?', (2001) 9 *ERPL*, pp. 485-503 (500) and H. Kötz, 'Savigny v. Thibaut und das gemeineuropäische Zivilrecht', (2002) 10(3) *Zeitschrift für Europäisches Privatrecht*, pp. 431-435 (435), consider a European Supreme Court as necessary to at least partly safeguard legal unity in the event a European code of private law is realized.

102 O. Lando, 'Why codify the European law of contract', (1997) 5 *ERPL*, pp. 525-535 (534-535).

103 K. Riedl, 'The work of the Lando-Commission from an alternative viewpoint', (2000) 8 *ERPL*, pp. 71-83 (82-83).

parative law. Secondly, when such a *droit commun* has been more or less realized, a European codification would be needed.

Ideally, this European *droit commun* should be developed by writers who are closely linked to legal practice, as happened in France. They should use the legal material of the various member States, as well as the European rules which have an impact on private law. They should preferably have been barristers or judges for many years. One of the reasons why this is important is that according to this scenario the newly developing *droit commun* should be applied by national courts. In the last decade or two, this approach has been in some form or another on the minds of many lawyers, especially those with a [185] background of comparative law or legal history.¹⁰⁴ Famous academics, such as Zimmermann, who rightly points to the relevance of Roman law for a *ius commune*, and Coing are among them.¹⁰⁵ Some writers also acknowledge the essential role of the national judges in this process.¹⁰⁶ A lot of work has already been carried out on the drafting of a European private law by lawyers, as the contribution of Schreiner to this volume clearly shows. I have already mentioned the PECL of the Lando commission.¹⁰⁷ In 1994 the Trento Project was started, directed by Bussani and Mattei and designed to develop a common

104 I only mention here: H. Kötz, 'Comparative legal research and its function in the development of harmonized law. The European perspective', in: N. Jareborg (ed.), *op. cit.*, pp. 21-36; W. van Gerven, 'Comparative law in a texture of communitarization of national laws and europeanization of community law', in: *Liber Amicorum in honour of Lord Slynn of Hadley (I): Judicial review in European Union Law*, The Hague: Kluwer Law International (2000), pp. 433-445; A. Chamboredon, 'The debate on a European civil code: for an "Open Texture"', in: M. van Hoecke & I. Ost (eds.), *The harmonisation of European private law*, Oxford: Hart Publishing (2000), pp. 63-99; H.-P. Mansel, 'Rechtsvergleichung und europäische Rechtseinheit', (1991) 46 *Juristenzeitung*, pp. 529-534.

105 R. Zimmermann, 'Roman law and European legal unity' in: A.S. Hartkamp et al. (eds.), *op. cit.*, pp. 21-39. Id., 'Civil code and civil law. The "Europeanization" of private law within the European community and the re-emergence of a European legal science', (1995) 1 *Columbia Journal of European law*, pp. 63-105; H. Coing, 'European common law: historical foundations', in: M. Cappelletti (ed.), *New perspectives for a common law of Europe*, Leiden: Sijthoff (1978), pp. 31-44. The idea that until 1800 the so-called *ius commune* constituted a uniform European private law has been rather sharply criticized by W. Brauner, 'Europäisches Privatrecht; aber was ist es?', (1993) 15 *Zeitschrift für Neuere Rechtsgeschichte (ZNR)*, pp. 225-235, and P. Caroni, 'Der Schiffbruch der Geschichtlichkeit: Anmerkungen zum Neo-Pandektismus', (1994) 16 *ZNR*, pp. 85-100. See for a historical analysis of the *ius commune* of Europe during the *Ancien Régime* also A. Wijffels, 'European private law: a new software-package for an outdated operating system?', in: M. van Hoecke & I. Ost (eds.), *op. cit.*, pp. 101-116.

106 L. Niglia, 'The non-europeanisation of private law', (2001) 9 *ERPL*, pp. 575-599 (597-599).

107 O. Lando, 'Principles of European contract law. An alternative or a precursor of European legislation', (1992) 56 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, pp. 261-273.

core of European private law'.¹⁰⁸ Van Gerven, in cooperation with many others, launched in 1994 a project of casebooks for a common law of Europe.¹⁰⁹ The Study Group on a Civil Code, also called The Von Bar-group after its chairman, commenced its work in 1999.¹¹⁰ There is also a 'European Group on tort [186] law', with its headquarters in Tilburg. This so-called Tilburg Group has already published several volumes on 'principles of European tort law'.¹¹¹ It is hardly surprising that the EU has financially supported some of these groups.

I am not sure whether these pioneers are really following the footsteps of Dumoulin and the other *coutumiers*. For a start, their point of departure seems to show some important differences from the situation in which their predecessors found themselves in *Ancien Régime* France. The national systems of today are not deficient in the way the French customary legal systems were. The law of the member states is written, systematized and covers most areas of life in a very detailed manner. Moreover, it is taught and applied by firmly established national institutions, such as universities and courts. In short, the national law systems consist, unlike the French customary law systems of the seventeenth and eighteenth centuries, of hard law. After all, that is the reason why Finnish law does not have any formal authority in the courts of Spain.

Some writers argue that the development of a uniform private law should result from competition of legal rules. Smits, for example, expresses the hope that national courts will receive legal rules of foreign countries or parts of the developing *droit commun* on the basis of their persuasive authority, because these rules provide 'better law'.¹¹² However, unlike the legal systems of early modern France, the demand for 'better law' is likely to be limited in modern legal systems due to the fact that they are intrinsically well suited to coping with new legal challenges. As a result of this different point of departure, it is questionable whether national judges will apply the developing European *droit commun*. The remarks of Niglia on the application by judges of directives in

108 The project is described in M. Bussani and U. Mattei, 'The common core approach to European private law', (1997-1998) 4 *Columbia Journal of European law*, pp. 339-356. Cf. also E. Hondius, 'The common core of European private law, Trento, 15-17 July 1999', (2000) 8 *ERPL*, pp. 249-251.

109 W. van Gerven, 'Casebooks for the common law of Europe. Presentation of the project', (1996) 4 *ERPL*, pp. 67-70.

110 C. von Bar & O. Lando, 'Communications on European contract law: joint response of the Commission on European Contract Law and the Study Group on a European civil code', (2002) 10 *ERPL*, pp. 183-248, with an extensive bibliography on the subject (pp. 242-248).

111 J. Spier & O.A. Haazen, 'The European Group on tort law ("Tilburg Group") and the European Principles of Tort Law', (1999) 7 *Zeitschrift für europäisches Privatrecht*, pp. 469-493. Just recently, volume 8 has been published: U. Magnus & M. Martín-Casals (eds.), *Unification of tort law: contributory negligence*, The Hague/London/New York: Kluwer Law International (2004).

112 J.M. Smits, *The good Samaritan in European private law*, Deventer: Kluwer (2000), p. 40. He realizes that this method might not lead to complete legal unity, but that is acceptable in his view.

the field of private law do not appear to be very promising.¹¹³ He states that as a result of judicial disregard of the directives national courts have preserved the traditional body of legal precepts. The conclusions reached by Lee in his contribution to this volume seem to confirm this. He argues that the institutions of the EU are now highly developed and consequently are able to contribute significantly to legal integration, in accordance with the theory of neofunctionalism. He also clearly states, however, that especially in the field of private law directives have become the object of national resistance. Directives run the risk of suffering the same fate as the royal *ordonnances* in seventeenth and eighteenth-century France. The resulting lack of penetration of EU law into the private law systems of the member States proves that the nation states have retained considerable sovereignty. Law firms obviously realize this since they still emphasize representation on a national level.

The lack of immediate relevance for legal practice is in some ways reflected in the work as well as the background of most of the pioneers. Their writings usually do not comment on other legal systems from the perspective of their own, as in the French scenario. Most of them have left out this phase and have moved on directly to formulating general principles. Furthermore, the pioneers have concentrated on specific fields of law, especially contract law. Neither are these deviations from the French scenario surprising from a practical point of view. Firstly, there is no obvious demand for extensive legal literature on a comparative basis in the national legal practices. More importantly, the national legal systems of today are so elaborate that an endeavor according to the original process would require an immense effort. The Dutch civil code consists of at least 2,000 provisions, which would all need to be commented upon on the basis of the provisions of twenty odd other national legal systems. I do not dare to imagine the number of pages needed for a complete description of and comparative comment on Article 6: 162 of the Dutch civil code, which covers tort. In France, admittedly, a dominant role was attributed to the *coutume de Paris* and this made things a little less complicated. But it would be hard to determine which national legal system should play the same part in the European *droit commun*.

As to their background, most of the pioneers are not practitioners, as was the case in the French scenario. As also observed by Schreiner, the majority of participants working on the projects concerned with European law are academics. This could be a result of the lack of demand in practical circles for legal products on a comparative footing, but some writers also have more or less attributed the task of developing a European common law to scholars.¹¹⁴ Of course, some scholars realize the importance of a tight connection between

113 Niglia (2001), *op. cit.*, pp. 590-597. Cf. also G. Teubner, 'Legal irritants: good faith in British law or how unifying law ends up in new divergences', (1998) 61 *Modern Law Review*, pp. 11-32.

114 H. Kötz, 'The common core of European private law: third general meeting, Trento 17-19 July 1997', (1997) 5 *ERPL*, pp. 549-552; Kötz (2002), *op. cit.*, p. 435.

comparative legal writing and legal practice.¹¹⁵ It is, however, questionable whether this connection can be established in view of the hard national legal systems. It has been suggested that legal education might have to play a considerable part in this respect.¹¹⁶ Some law schools have already started with a curriculum that is for the most part based on courses of comparative law, despite the fact that this could put in danger the collaboration between legal writing and legal practice. Academic lawyers, who in an attempt to reach for the heights of comparative law pay too little serious attention to the law of the state in which they work, jeopardize the relevance of academic law for legal practice.¹¹⁷ This is illustrated by the fate of legal education at the French universities during the *Ancien Régime*. These law schools focused almost exclusively on Roman law and created thereby a yawning gap between theory and practice, which contributed greatly to their decline. The American experience is interesting in this respect. Friedman and Teubner have argued that national law schools teaching law on the basis of a national curriculum only developed in the United States as a response to the mobility of lawyers across state lines.¹¹⁸

Let us suppose that the approach of these pioneers will be as successful as the French scenario and lead to a European *droit commun* comparable to its French counterpart. Even then a European code would be required, since a codification constituted the second indispensable element of the French scenario. In 1800, the efforts of the coutumiers had not resulted in a uniform French private law. Not only was the force of the *droit commun* mainly limited to the northern *pays de droit coutumiers*, the South of France being submitted to rules of private law that were heavily influenced by Roman law. But even within the northern territories, the legal diversity resulting from the prevalence of local customary law was still considerable. The *droit commun* was only a subsidiary source of law, albeit with great authority. The development of a European *ius commune* will at best result in such a situation. The civil code systems might to some extent have grown together, but there still will remain considerable differences. Furthermore a more clear-cut division with the Common law system

115 Niglia (2001), *op. cit.*, 597-599.

116 A. Flessner, 'Rechtsvereinheitlichung durch Rechtswissenschaft und Juristenausbildung', (1992) 56 *Rabels Zeitschrift*, pp. 243-260; Riedl (2000), *op. cit.*, p. 83; Van Gerven (2001), *op. cit.*, p. 503.

117 J.M. Smits, *Europees privaatrecht in wording. Naar een Ius Commune Europaeum als gemengd rechtstelsel*, Antwerpen: Intersentia (1999), p. 62.

118 L.M. Friedman & G. Teubner, 'Legal education and legal integration: European hopes and American experience', in: M. Cappelletti, M. Seccombe & J. Weiler (eds), *Integration through law. Europe and the American federal experience (I.3): Forces and potentials for a European identity*, Berlin/New York: De Gruyter (1986), pp. 345-380 (368). Equally sceptical about the value of the American example for Europe is M. Reimann, 'Amerikanisches Privatrecht und europäische Rechtseinheit – Können die USA als Vorbild dienen?', in: R. Zimmermann (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht*, Tübingen: Mohr (1995), pp. 132-155.

might remain. To realize further legal unity in Europe a codification would be required.

The idea of a European codification of private law has of course attracted the attention of many lawyers and indeed some support as well. Significantly, some advocates of a European civil code can be found among those already working on the development of a European *droit commun*. Lando fears that such an unwritten *droit commun* will not lead to legal unity within a reasonable time. He is convinced that only a codification of, for example, the PCEL can provide that unity.¹¹⁹ Mattei of the Trento Project recently insisted on an immediate codification, because in his view unification through 'soft law' will [189] lead to the loss of the values of the European social model of capitalism.¹²⁰ It is hardly surprising that lawyers have also considerably contributed to the opposition to the idea of a European Code.¹²¹ Moreover, they have tackled the issue of a legal basis for a European civil code, in particular whether the authority of the EU institutions allows such an endeavor at the moment.¹²²

Notwithstanding, however, the obviously important role of lawyers in the debate on the possibility of a European civil code, as well as in the preparations thereof, I would like to emphasize that the ultimate decision will not be theirs. As in the French process, such a decision involves the very constitution of the future European state, whether it be predominantly unitary or not. Since this is an issue of a profoundly political nature, I would posit that it will be decided by politicians, as in France at the end of the eighteenth century. Some politicians in the European arena have already addressed the issue, as the decisions of the European Parliament and the communication of the European Commission show.¹²³ Given the considerable sovereignty retained by the member States, however, it is highly unlikely that a uniform codification of private law will be decided upon at a European level in the near future.

6. Epilogue

In this paper I have addressed the various contributions of lawyers to the process of state formation. I have attempted to describe the role of these lawyers

119 Lando (1997), *op. cit.*, p. 535. Another protagonist of codification is: G. Alpa, 'European community resolutions and the codification of "private law"', (2000) 8 *ERPL*, pp. 321-333.

120 Mattei (2002), *op. cit.*, *passim*.

121 I only mention here: B.S. Markesinis, 'Why a code is not the best way to advance the cause of European legal unity', (1997) 5 *ERPL*, pp. 519-524; P. Legrand, 'Against a European civil code', (1997) 60 *Modern Law Review*, pp. 44-63.

122 W. Tilmann, 'The legal basis for a European civil code', (1997) 5 *ERPL*, pp. 471-473; W. van Gerven, 'Coherence of community and national laws. Is there a basis for a European civil code?', (1997) 5 *ERPL*, pp. 465-469.

123 W. Tilmann, 'Zweiter Kodifikationsbeschluss des Europäischen Parlaments', (1995) 3 *Zeitschrift für europäisches Privatrecht*, pp. 534-551. D. Staudenmayer, 'The commission communication on European contract law: what future for European contract law?', (2002) 10(2) *ERPL*, pp. 249-260.

independently of an evaluation of the various processes of state formation itself. Such an evaluation has not been the issue here, not even of the process of state formation at a European level, as we are witnessing in our time. Whatever the verdict over these processes, it has become clear from my description that the contribution of lawyers to these processes has been considerable. They not only did their share on a more or less technical level, but occasionally were very influential on an intermediate, more political level. Especially in periods of constitutional uncertainty and change, they were able to come to the fore, as is illustrated by the *avocats* in medieval France, the English judges who forged the common law and recently the judges of the European Court of Justice. Notwithstanding, however, the fact that these lawyers could therefore – particularly when operating on this intermediate level – be regarded as ‘political en-[190]trepreneurs’, it should be noted that their role was usually not politically decisive. As is also shown by the history of legal integration in France, more often than not major political decisions are made by politicians without legal training.